proving a *prima facie* case at the end of its case, the right not to call such witness/witnesses and to make him/them available to the defence will be of no avail. If the doubt consists of the gap arising out of the matters adumbrated earlier, the prosecution must close this gap. It is not for the defence to call the offered witness/witnesses to supplement the prosecution case.

In the circumstances of this case, the Assistant Manager should have been called to explain those three matters and the office-boy to explain about the windows. It may well be that if these two were called, their evidence would be favourable to the prosecution, but unless they had given their testimonies, the court could not be sure and should not indulge in conjectures and possibilities.

Thus, our answer to the question for which we granted leave should be that the prosecution's right not to call a witness from whom statements have been taken must always be guided by its duty to discharge the onus of proof.

Since the answer to the question affects the event of the applicant's appeal to the High Court we quashed his conviction and sentence.

Order accordingly.

Solicitors: *Stanley Ponniah, Ng & Soo.*

SYARIKAT MALTACO SDN. BHD. v. EOW TEH YU & ORS.

[S.C. (Wan Suleiman, Seah & Hashim Yeop A. Sani S.C.JJ.) December 7, 1984 & January 18, 1985]
[Kuala Lumpur – Federal Court Civil Appeal No. 166 of 1984]

Practice and Procedure – Appeal from Director of Labour – Time within which appeal should be filed – Employment Act, 1955, s.77 – Subordinate Courts Rules, 1980, O.49 r.2(3) – R.H.C., 1980, O.55 r.13(1) & (2).

In this case the appellant applied to set aside the order of the Assistant Director of Labour, Klang. Objection was raised that the application was filed out of time. The issue was whether the appeal from the decision of the Assistant Director of Labour should be filed within 14 days as stated in order 49 rule 2(3) of the Subordinate Courts Rules 1980 or within one month as stated in Order 55 rule 13 of the Rules of the High Court, 1980. In the High Court the application was dismissed and the appellant appealed.

Held: (1) it is clearly the intention of the legislature that the procedure of appeal against the decision of the Director-General under section 69 of the Employment Act, 1955, shall be the procedure in a civil appeal from the Sessions Court as provided by Order 49 rule 2 of the Subordinate Court Rules 1980 and not Order 55 rule 13 of the Rules of the High Court, 1980;

(2) the appellant was therefore out of time and this was not a case where the appellant should be heard on an application for extension of time.

Cases referred to:

(1) *Yong Yoke Sung & Ors* v. *Sungei Way Estate* [1966] 1 M.L.J. 175.
(2) *Krishnasamy* v. *New Selangor Plantations Sdn. Bhd.* K.L. Originating Motion A 35 of 1982. (*unreported*).
(3) *Abaco Estate* v. *Selvarajah* K.L. Civil Appeal No. 22 of 1983 (Case which is under appeal *vide* F.C.C.A. 281/84, will be reported in the next issue).

SUPREME COURT.

G. Ambiavagar for the appellant.
B. Lobo for the respondents.

Cur. Adv. Vult.

Hashim Yeop A. Sani S.C.J. (delivering the Judgment of the Court): The appellant was applicant before the learned Judge in an Originating Motion to set aside the order of the Assistant Director of Labour, Port Klang. The order sought to be set aside was that the applicant was to pay a sum of $14,180.36 cts being overtime wages to the respondents. The order of the Assistant Director of Labour was made on March 28, 1981 and the Originating Motion was filed on April 27, 1981.

Mr. Lobo on behalf of the respondents raised a preliminary objection before the learned Judge contending that the Originating Motion was filed out of time and therefore the court had no jurisdiction to hear the appeal. What became an issue was whether the appeal from the decision of the Assistant Director of Labour, Port Klang should be filed within 14 days as stated in Order 49 Rule 2(3) of the Subordinate Courts Rules 1980 as then applicable or within one month as stated in Order 55 Rule 13 of the Rules of the High Court, 1980.

For convenience the provisions of the law on procedure of appeal applicable on the date of the

decision of the Assistant Director of Labour, Port Klang in this case are reproduced below:—

Section 77 of the Employment Act 1955 (Revised 1981) provides as follows:

"77(1) If any person whose financial interests are affected is dissatisfied with the decision or order of the Director General under section 69 or section 73 such person may appeal to the High Court.

(2) *Subject to any rules made under section 4 of the Subordinate Court Rules Act 1955,* the procedure in an appeal to the High Court shall be the procedure in a civil appeal from a Sessions Court with such modifications as the circumstances may require."

Section 4 of the Subordinate Courts Rules Act 1955 (Revised 1971) provides as follows:

"4. *Subject to any rules of court made under the Courts of Judicature Act 1964* the Committee may make rules for the following purposes:—

(a) .....

(b) for regulating and prescribing the procedure in proceedings by way of appeal from a Subordinate Court to the High Court, *the time within which any* such appeal may be brought, and the procedure in connection with the transfer of proceedings from any Subordinate Court to the High Court or from the High Court to a Subordinate Court."

On April 1, 1981 the Subordinate Courts Rules 1950 was repealed and replaced by the Subordinate Courts Rules 1980. Order 49 Rule 2(3) of the 1980 Rules like the 1950 Rules also provides that the notice of appeal shall be filed within 14 days from the date on which the decision was pronounced:

"2. (3) The notice of appeal shall be filed within 14 days from the day on which the decision was pronounced. The Court appealed from shall thereupon supply to the appellant, upon payment of the fee therefore, a certified copy of the judgment, or, in case no written judgment has been delivered, of the grounds of decision."

Order 55 Rule 13(1) and (2) of the High Court Rules 1980 provides as follows:

"13.(1) Where under any written law an appeal lies from any decision of any person or body of persons to the High Court such appeal shall be made to the High Court in the State where the decision was given by motion setting out the grounds of appeal, supported by affidavit and, if the Court so directs at the hearing, by oral evidence.

(2) *Unless otherwise provided by any written law,* such appeal shall be made within one month from the date on which the decision was given or the date on which such decision was notified to the person appealing, whichever is the later date."

The appellant relied on *Yong Yoke Sung & Ors.* v. *Sungei Way Estate,* [1] a Federal Court decision. The appeal there was heard on December 1, 1965. In that case Mr. Peddie by way of preliminary objection argued as he had argued before the High Court that the appeal was never properly before the High Court because the appellants had not followed the procedure laid down by section 77(2) of the Employment Ordinance, 1955, and Order 59 Rule 13 of the Rules of the High Court (now Order 55 Rule 13) and that by reason thereof that court had no jurisdiction to hear the appeal and consequently the appeal was not cognizable by the court. Pike C.J. in his judgment said at page 177:

"It seems clear that the intention of the Legislature was that appeals from the commissioner should be regulated by rules of Court made under the Rule Committee Ordinance but that until such rules were made the procedure should be the same as for a civil appeal from a Sessions Court with such modifications as the circumstances may require. The addition of the words "with such modifications as the circumstances may require" seem to suggest that the Legislature recognised that the interim procedure which they were providing for would not be wholly appropriate and that it was only to ensure that there was no hiatus in the procedure for such appeals that the provision was made.

.....

'While it is clear that until by Legal Notice (N.S.) 120 of 1957 Order 59 rule 13 was made the procedure in such appeals would, with such modifications as the circumstances may have required, have been the procedure for civil appeals from a Sessions Court. Since the coming into force in 1957 of Order 59 rule 13 the procedure is in our view clearly that laid down in that rule, namely, that such an appeal must be brought by way of motion setting out the grounds of appeal, supported by affidavit and, if the court so directs at the hearing, by oral evidence. It follows therefore that the matter was not properly before the High Court but as in the view of this Court the success of the argument before the High Court would have resulted in leave being given for the proceedings to be brought before the court in proper form the Court decided to hear the appeal on the merits."

The decision of the learned Judge in the instant case (Harun J.) found support in two previous decisions of Wan Hamzah F.J. in two similar cases on the same question. The two cases are *Krishnasamy s/o Vythilingam & 2 Ors.* v. *New Selangor Plantations Sdn. Bhd.* [2] and *Abaco Estate* v. *Selvarajah a/l Thamboo.* [3] In both these cases Wan Hamzah F.J. ruled that the procedure to be adopted in an appeal under section 77 of the Employment Act is the procedure laid down in the Subordinate Courts Rules 1980.

Wan Hamzah F.J. crystallised his thinking in the second case of *Abaco Estate* and in that case he considered *Yong Yoke Sung & Ors.* and in effect ruled that the decision should be understood in the

context of the time it was made. We think that this is a correct approach to and evaluation of the decision having regard to the state of the law today. For convenience we reproduce that part of the judgment of Wan Hamzah F.J.:

"The decision of the Federal Court in that case was made when the Rule Committee Ordinance, 1955 in its old form was in force. At that time the Rules of the Supreme Court 1957 were also in force and had not been replaced by the Rules of the High Court 1980. As pointed out by Pike C.J. in that case, section 77(2) of the Employment Ordinance 1955 at that time should be read as follows:

'Subject to any rules made under section 4 of the Rule Committee Ordinance 1955, the procedure in an appeal to the High Court shall be the procedure in a civil appeal from a Sessions Court with such modifications as the circumstances may require.'

In his judgment Pike C.J. stated –

'Section 4 of the Rule Committee Ordinance 1948 has been repealed and replaced by section 4 of the Rule Committee Ordinance 1955. In each section there was provision for the making of rules for 'regulating and prescribing the procedure on appeals from any court or person(s) to the Court of Appeal or the High Court' .....'

Pike C.J. was referring to section 4(b) of the Rule Committee Ordinance 1955, the relevant parts of which read as follows:

'4. It shall be the duty of the Rule Committee from time to time and as occasion may require to make rules for the following purposes –

(a) .....

(b) for regulating and prescribing the procedure in proceedings by way of appeal from any Court or persons to the Court of Appeal or the High Court, the time within which any such appeal may be brought, and .....'

At that time section 4 of the Rule Committee Ordinance 1955 provided for the function of one and the same Rule Committee for making rules for regulating the procedure and the practice to be followed in the High Court and in Subordinate Courts respectively. It also provided for the function of the same Rule Committee to make rules for prescribing the procedure in proceedings by way of appeal to the High Court not only from the decisions of subordinate courts but also from the decisions of persons like the decision of Penolong Pengarah Buruh in the present case. Thus the Rules of the Supreme Court 1957 were made by that Rule Committee (established under section 3) pursuant to the powers conferred by section 4 of the Rule Committee Ordinance 1955. Therefore the Rules of the Supreme Court 1957 were rules referred to in the opening words of section 77(2) of the Employment Ordinance, i.e. the words 'Subject to any rules made under section 4 of the Rule Committee Ordinance 1955'. I believe that if they were not so, the Federal Court would not have held that Order 59 Rule 13 of the Rules of the Supreme Court 1957 applied in that case.That this was so is shown by the fact that Pike C.J. took pains to explain that the reference to section 4 of the Rule Committee Ordinance 1948 contained in the opening words of section 77(2) of the Employment Ordinance must be construed as a reference to section 4 of the Rule Committee Ordinance 1955. Pike C.J. also stressed that the opening words of section 77(2) were not mere surplusage, on the ground that a perfectly sensible meaning could be given to them."

It would seem that Harun J. also recognised the desirability of understanding *Yong Yoke Sung & Ors.* in the context of the time when the judgment was written when he said at page 7 of his judgment in the instant case:

"By the time the Federal Court heard that case, the Rules of the Supreme Court 1957 had come into force which is the reason why it held that RSC O. 59 r. 13 applied in that case. On a proper sequence of legislation therefore, the interim procedure of applying the procedure of appeals from the Sessions Court to the High Court in section 77(2) of the Employment Ordinance ceased to apply on April 1, 1958 (the date when the Rules of the Supreme Court 1957 came into force)."

In our opinion the words "subject to any rules made under section 4 of the Subordinate Courts Rules Act 1955" appearing at the commencement of section 77(2) of the Employment Act are not surplusage. If it was not clear before, it is clear now that with those words the intention of the Legislature is to abide by the procedure laid down by the Subordinate Courts Rules.

The direction given in section 77(2) was that the *procedure* in an appeal to the High Court shall be the procedure in a civil appeal from the Sessions Court. Having regard to section 4(b) of the Subordinate Courts Rules Act 1955 the time within which any such appeal may be brought is clearly part of the procedure. Therefore the "modifications" referred to in section 77(2) are only modifications as to form and not as to time. We also do not think that the words "subject to any rules of court made under the Courts of Judicature Act 1964" appearing at the commencement of section 4 of the Subordinate Courts Rules Act have any effect on Order 49 Rule 2(3) of the Subordinate Courts Rules 1980 because of the clear words "unless otherwise provided by any written law" appearing at the commencement of Order 55 Rule 13(2) of the High Court Rules 1980.

We are therefore satisfied that it is clearly the intention of the Legislature that the procedure of appeal against the decision of the Director-General under section 69 of the Act shall be the procedure in a civil appeal from the Sessions Court as provided by Order 49 Rule 2 of the Subordinate Court

Rules 1980 and not Order 55 Rule 13 of the High Court Rules 1980.

Miss Ambiavagar for the appellant stated that she had made a verbal application to the learned Judge for extension of time if the Judge held that she was out of time but the Judge refused to entertain her application. This fact was however not recorded anywhere in the judgment. Mr. Lobo on the other hand drew our attention to a copy of a letter from the respondent's solicitors to the appellant's solicitors dated May 20, 1983 (Enclosure (89) in Bundle of Appeal) giving notice of the preliminary objection and that this notice was in fact given one year before the application was heard by Harun J. and yet Miss Ambiavagar had not at any time made any formal application for leave to extend time.

We are of the view that this is not a case where the appellant should now be heard on an application for extension of time.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

Solicitors: *Ambiavagar & Co.; Lobo & Associates.*

TAN KUAN YAU v. SUHINDRIMANI

[S.C. (Abdul Hamid C.J. (Malaya), Hashim Yeop A. Sani & Abdoolcader S.C. JJ.) January 22 & February 11, 1985]
[Ipoh – Federal Court Civil Appeal No. 20 of 1984]

Tort – Damages arising from road accident – Special Damages – Appeal on quantum of damages – Principles applicable – Misdirection by trial judge.

Practice and Procedure – Appeal on quantum of damages – Principles applicable – Misdirection by trial judge.

This was an appeal against the decision of the High Court in respect of an award for special damages arising from a road accident in which the respondent sustained injuries. The respondent was a goldsmith and the learned trial judge assessed his loss of income at $1000/– per month. On that basis he awarded $30,000.00 for 30 months during which the respondent was incapable of doing any work; $4900.00 for 7 months during which time the respondent had resumed work but only earned a reduced income of $300.00 per month and $42,270.00 for loss in earning capacity for a period of 25 years at $250.00 per month. The appellant appealed.

Held: (1) the principle which should guide the court in determining whether it should interfere with the quantum of damages is crystal clear. Much depends on the circumstances of each case, in particular the amount of the award. In a particular case therefore it is for the appeal court to consider whether in the light of the circumstances of the case there is an erroneous estimate of the amount of damages in that either there was an omission on the part of the Judge to consider some relevant materials or he had admitted for purposes of assessment some irrelevant consideration. If the court is satisfied or convinced that the Judge has acted upon wrong principles of law then it is justified in reversing; indeed, it is its duty to reverse the finding of the trial judge;

(2) in this case the clear evidence was that the profit of the business was $600/– per month and there was therefore a serious misdirection in law by the learned trial judge in assessing the loss of income at $1000.00 per month and this justified interference by the appeal court;

(3) proceeding upon the basis that there was a profit of $600.00 per month and allowing a deduction of $100.00 per month for the share of the father, for the 30 months for which the respondent was not able to work he ought only to have been awarded a total sum of $15,000.00 ($500 x 30), for the next 7 months when the respondent was getting a reduced income of $300.00 per month he should be awarded only a sum of $1400.00 ($200 x 7); for loss of earning capacity, a loss of income of $100.00 per month would be a fair assessment and he should be awarded $16,900.00.

Cases referred to:

(1) *Topaiwah* v. *Salleh* [1968] 1 M.L.J. 284, 285.
(2) *Flint* v. *Lovell* [1935] 1 K.B. 354.
(3) *Greenfield* v. *London and North Eastern Railway Company* [1945] K.B. 89.
(4) *Wilson* v. *Pilley* [1957] 3 All E.R. 525, 526.
(5) *Elliot* v. *Preston* [1971] 2 L1.L.R. 328, 330.
(6) *Ilkiw* v. *Samuels* [1963] 2 All E.R. 879, 890.

SUPREME COURT.

Gurdip Singh for the appellant.
J.S. Sandu for the respondent.

Cur. Adv. Vult.

Abdul Hamid C.J. (Malaya) (delivering the Judgment of the Court): This was an appeal against the decision of Anuar J. in the High Court at Ipoh on November 22, 1983 in respect of the award for special damages arising from a road accident on October 24, 1979 in which the respondent sustained injuries.

The respondent aged 23 years at the time of the accident, 27 years at the date of the trial, was a goldsmith. He gave evidence that he started to work at the age of 14 with his goldsmith father who, at all material times, was the registered proprietor of the business at a shop along Main Road, Tapah. As his father was old he did most of the work and the income went to him. His father continued to assist him. His monthly income prior to